

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DAVID GORDON FLEMING,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:14-cv-00327-JAW
	)	
WARDEN, MAINE STATE PRISON,	)	
	)	
Respondent.	)	

**ORDER AFFIRMING RECOMMENDED DECISION  
OF THE MAGISTRATE JUDGE**

On August 15, 2014, David Gordon Fleming filed with this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he is in custody in violation of the United States Constitution. *Pet. for Writ of Habeas Corpus* (ECF No. 1). On August 21, 2014, the Magistrate Judge issued a recommended decision in which he recommended that the Court dismiss the petition because it is a second or successive § 2254 petition and the record does not reflect that the First Circuit Court of Appeals has authorized this Court to consider the petition. *Recommended Decision on 28 U.S.C. § 2254 Pet.* (ECF No. 2). On September 2, 2014, Mr. Fleming objected to the Recommended Decision. *Objection to Report and Recommended Decision* (ECF No. 3). The primary ground for Mr. Fleming's objection is his assertion that the Magistrate Judge erred in stating that his earlier § 2254 petition barred his current § 2254 petition because, Mr. Fleming contends, the earlier § 2254 petition had been stayed. *Id.* at 1.

The Court reviewed Mr. Fleming's earlier § 2254 petition and the Court concludes that Mr. Fleming is wrong about the earlier-filed petition. Mr. Fleming filed a petition for writ of habeas corpus on July 5, 2005 in this Court under docket number 1:05-cv-00093-GZS. *Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody* (ECF No. 2) (Docket No. 1:05-cv-00093-GZS). On February 1, 2006, the Magistrate Judge recommended that the motion to dismiss the petition of Jeffrey Merrill, the then Warden of the Maine State Prison, should be granted. *Recommended Decision on Mot. to Dismiss* (ECF No. 16). On February 23, 2006, the Court affirmed the Recommended Decision. *Order Affirming Recommended Decision of the Magistrate Judge* (ECF No. 17). On the same day, the Order was reduced to Judgment. *J.* (ECF No. 18). There was no appeal. The case was never stayed.

Thus, contrary to Mr. Fleming's memory, he did file a prior petition for writ of habeas corpus under 28 U.S.C. § 2254 and the Court never stayed that petition. Instead, the Court dismissed the petition and issued a final judgment against it. As such, the pending petition is a second or successive petition and must be dismissed for the reason set forth in the Magistrate Judge's Recommended Decision.

The Court OVERRULES David Gordon Fleming's Objection, AFFIRMS the Magistrate Judge's Recommended Decision, and ORDERS his Petition for Writ of Habeas Corpus DISMISSED (ECF No. 2). It is further ORDERED that no certificate of appealability should issue in the event the Petitioner files a notice of appeal

because there is no substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c)(2).

SO ORDERED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
CHIEF UNITED STATE DISTRICT JUDGE

Dated this 3rd day of September, 2014